Supreme Court, U.S.
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No. 00-1221

In The

Supreme Court of the United States

LUC MARTINI,

Petitioner,

v.

THE BOEING COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In Cleveland v. Policy Management Systems Corp., 526 U.S. 795, 807 (1999), this Court stated: "When faced with a plaintiff's previous sworn statement asserting 'total disability' or the like, the court should require an explanation of any apparent inconsistency with the necessary elements of an ADA claim. To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless 'perform the essential functions' of her job, with or without 'reasonable accommodation.' " The question presented is:

> Whether the Ninth Circuit Court of Appeals properly upheld summary judgment pursuant to Cleveland because Martini was unable to reconcile his repeated representations of total disability with the requirements of a prima facie case under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 and the Washington Law Against Discrimination, RCW 49.60 et seq.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The Boeing Company has no parent companies, subsidiaries (except for wholly owned subsidiaries), or affiliates that have issued shares to the public.

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STATUTES INVOLVED

This case involves the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (the "ADA") and the Washington Law Against Discrimination, RCW 49.60 et seq. (the "WLAD"), and, in particular, plaintiff's burden of proving that he is a "qualified individual with a disability," that is, a person "who, with or without reasonable accommodation, can perform the essential functions" of his job. 42 U.S.C. § 12111(8); RCW 49.60.180.

I. STATEMENT OF THE CASE

A. INTRODUCTION

Martini's petition reflects a selective – and often misleading – recitation of the facts. The bottom line is quite simple: the Ninth Circuit properly upheld the entry of summary judgment to The Boeing Company ("Boeing") pursuant to this Court's decision in Cleveland v. Policy Management Systems Corp. because Martini was unable to reconcile repeated and ongoing representations of total disability with his burden of proving he was qualified for the position sought.

B. RELEVANT FACTS

1. Petitioner Has Been Receiving Disability Benefits From the Social Security Administration Since 1991.

Petitioner was employed by Boeing until the summer of 1990, when he resigned from his job. On December 12,

1990, petitioner applied for social security disability benefits (hereinafter, "SSD benefits"), claiming he had a disabling condition that prevented him from working. SER 192-99, 209.[1] Petitioner made the following representations (among others) in his application for SSD benefits:

> I became unable to work because of my disabling condition on July-16, 1990.[2] I am still disabled.
>
> I agree to notify the social security administration if:
>
> – my medical condition improves so that I would be able to work, even though I have not yet returned to work.
>
> . . . .
>
> I know that anyone who makes or causes to be made a false statement or representation of material fact in an application or for use in determining a right to payment under the Social Security Act commits a crime punishable under federal law by fine, imprisonment or both. I affirm that all information I have given in connection with this claim is true.

SER 192-99.

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[1] Citations to the factual record below are abbreviated as "CR" for Clerk's Record, "ER" for Excerpts of Record, and "SER" for Supplemental Excerpts of Record.

[2] As the Social Security Administration ("SSA") made clear to Martini after he submitted his application, SSD benefits are available only to individuals who are "unable to do any substantial gainful work due to a medical condition. . . . " SER 250.

On February 11, 1991, the SSA sent petitioner a letter informing him that his application for SSA benefits had been denied. SER 249-51. The letter explained petitioner's right to request reconsideration of the decision and further explained what petitioner needed to prove in order to obtain SSD benefits:

> To be considered disabled, a person must *be unable to do any substantial gainful work* due to a medical condition which has lasted or is expected to last for at least 12 months in a row. The condition must be severe enough to keep a person from working not only in his or her usual job, but *in any other substantial gainful work.*

Id. (emphasis supplied). Petitioner filed a request for reconsideration, stating that his condition had worsened in numerous respects since his initial application. SER 223-25, 226-34.

In the spring of 1991, the SSA engaged Dr. Harvey Ries, a psychiatrist, to perform an independent medical examination of petitioner. SER 262-63, 88-89, 101. Dr. Ries diagnosed a major depressive disorder and a number of physical impairments, and he concluded that petitioner was "totally disabled," i.e., unable to engage in gainful employment, and had been so since the summer of 1990. SER 275-77, 101-02, 132-33. After receiving Dr. Ries's evaluation, the SSA determined on July 16, 1991, that petitioner was indeed "disabled," i.e., incapable of gainful employment, and that he was entitled to SSD benefits of $1052 per month. SER 244-48. Petitioner has been receiving SSD benefits continuously since that time, and his monthly benefit at the time of his appeal to the Ninth

Circuit was $1208. SER 200-01, 203. Petitioner has made no representations, and the record is devoid of any evidence, that he has ceased receiving SSD benefits.

2. Petitioner Has Also Applied for and Been Receiving Benefits From Boeing's Long-Term Disability Plan.

On May 21, 1991, petitioner applied for benefits under Boeing's long-term disability ("LTD") plan. SER 8-27. The LTD plan pays benefits to participants who are "totally disabled." SER 28-78. The plan defines "totally disabled" as (1) during the first two years of a period of disability, the employee is "unable . . . to perform the duties of [his] own occupation or other appropriate work made available" and (2) thereafter, the employee is *"unable . . . to work at any reasonable occupation."* Id. (emphasis supplied).

Petitioner represented on his LTD application that he was "totally disabled and unable to work." SER 18. When asked on the application when he would be able to return to work, petitioner wrote: "NO." Id. The application warned petitioner that making any false or misleading statement on the application might constitute a crime. Id.

Petitioner's application for LTD benefits was approved in August 1991, and his benefits were back-dated to January 17, 1991. SER 25. At the time of his appeal to the Ninth Circuit, petitioner continued to receive monthly LTD benefits of $1,229. SER 201-02.

3. After Seeking Employment with Boeing in February 1996, Petitioner Testified During a Workers' Compensation Proceeding That He Is Incapable of Gainful Employment.

After resigning from Boeing, petitioner applied for workers' compensation benefits, ultimately claiming that a shoulder strain he experienced while lifting a piece of luggage during a business trip aggravated his other impairments – mental and physical – to the point where he became "incapable of performing employment." SER 148-49. On August 20, 1996, a judge of the Board of Industrial Insurance Appeals (the "Board") held a hearing to determine, among other things, whether petitioner "was capable of performing or obtaining gainful employment [from] August 21, 1990 to November 16, 1995, and from there forward." SER 147. During this hearing, Martini testified that he became totally disabled in the summer of 1990 and that he has been unable to work since that time:

> Q Have you ever worked at all after [your last date of employment with Boeing in 1990]?
>
> A No, I have not.
>
> Q Have you been able to work after that date?
>
> A *No, I have not.*
>
> . . . .
>
> Q Did the shoulder injury have an affect on the psychiatric condition or did it manifest it?
>
> A Yes, it was the causative thing that pushed me over the edge from being employed successfully *to being totally disabled.*

SER 143-44 (emphasis added). Significantly, petitioner's testimony at this hearing occurred *six months after he wrote his letter seeking employment at Boeing*. Martini's physician, Dr. Ries, concurred with Martini's statements that he became unable to work starting in the summer of 1990 and remained incapable of employment through, and as of the hearing date. SER 101-02, 111-17, 133-34.[3]

C. THE DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS CONCLUDED THAT BOEING WAS ENTITLED TO SUMMARY JUDGMENT ON MARTINI'S CLAIMS.

In February 1996, while still pursuing his workers' compensation claim, petitioner wrote a letter to Boeing expressing an interest in four positions. Martini was not hired, and he filed this lawsuit on March 18, 1997.

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[3] In addition to receiving disability-related benefits from three separate sources, Martini has also received front pay damages from Boeing for the same period of time for which he now seeks to recover. Martini initiated a separate lawsuit in state court in 1993, claiming, among other things, that Boeing forced him to quit his job. Martini presented testimony and argument that he was entitled to damages because he was totally unable to work. Despite significant disagreement as to the cause and extent of his disability, a jury verdict was returned in favor of Martini in October 1995. Martini v. The Boeing Company, 137 Wn.2d 357, 362, 971 P.2d 45 (1999). Martini recovered a front pay award of $480,932 based on the amount of money he would have earned at his former Boeing job from the date of his resignation through retirement age, less what he would have earned if he had sought employment outside of Boeing. Id.

On April 21, 1998, Judge Weinberg agreed with Boeing that Martini's medical evidence raised no genuine issue of material fact with respect to his inability to perform the essential functions of the job, with or without accommodation, and recommended that the District Court grant Boeing's summary judgment motion, which it did on June 2, 1998. Appendix to Certiorari Petition ("Pet. App.") at pp. 23a-33a.

Martini subsequently appealed, and on September 21, 2000 the Ninth Circuit Court of Appeals upheld the district court's grant of summary judgment to Boeing. The Ninth Circuit concluded that based on all the evidence, "Martini fails to sufficiently explain the inconsistency between his assertions of total disability and his discrimination claim to require submission to a jury, therefore we affirm." Pet. App. at pp. 1a-2a. Martini filed a petition for rehearing, which was denied by order dated October 31, 2000.

II. REASONS FOR DENYING THE PETITION

This case does not present a new legal issue, a split among the circuits, a mis-application of Supreme Court precedent, or any other compelling justification for granting certiorari as required by Supreme Court Rule 10. Less than two years ago, this Court directly addressed the issue presented by petitioner in Cleveland, and the Ninth Circuit correctly applied that precedent to decide this case. Instead of presenting a plausible justification for certiorari, the Petition represents nothing more than an attempt to gain a third rehearing on the merits in the hopes of finally receiving a favorable result.

A. THE PETITION DOES NOT MEET THE HIGH STANDARD FOR A GRANT OF CERTIORARI BECAUSE THIS COURT HAS ALREADY DIRECTLY ADDRESSED THE ISSUE AT BAR IN CLEVELAND v. POLICY MANAGEMENT SYSTEMS CORP.

1. Cleveland Held that Summary Judgment Is Appropriate When an ADA Plaintiff Is Unable to Reconcile Apparently Inconsistent Representations of Total Disability with the Requirements of a Prima Facie Case Under the ADA.

This Court directly considered the underlying issue in this case in Cleveland v. Policy Management Systems Corp., 526 U.S. 795 (1999). In a unanimous decision, this Court held that prior representations of total disability will not automatically bar a disability discrimination claim, nor erect a presumption against the plaintiff. Instead, the plaintiff's representations are relevant evidence that will lead to summary judgment if the plaintiff fails to provide a sufficient, reasonable explanation that reconciles the prior statements of *inability* to work with the plaintiff's burden of proving he is capable of working. As stated by this Court:

> [A] plaintiff's sworn assertion in an application for disability benefits that she is, for example, 'unable to work' will appear to negate an essential element of her ADA case – at least if she does not offer a sufficient explanation. For that reason, we hold that an ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier . . . disability claim. Rather, she must proffer a sufficient explanation.

. . . .

> To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless 'perform the essential functions' of [the] job, with or without accommodation.

Cleveland, 526 U.S. at 806-07. The issue presented by Cleveland, whether summary judgment is appropriate when an ADA plaintiff fails to reconcile representations of total disability with his burden of demonstrating that he is qualified under the ADA, is precisely the issue presented in this case. Pet. App. at pp. 1a-2a, 29a. Because this Court has already directly addressed this issue, a grant of certiorari is inappropriate. See, e.g., Lehman v. Lycoming County Children's Services, 458 U.S. 502, 507 (1982) (explaining that certiorari may be appropriate where the issue before the Court "is a question of importance not heretofore considered by this Court, and one over which the Circuits are divided").

Plaintiff offers nothing more than a minor factual difference between the two cases to support his argument that this Court's holding in Cleveland is inapplicable: Martini was a job applicant, whereas the Cleveland plaintiff was a current employee when the alleged wrongful conduct occurred. Petition for Writ of Certiorari ("Petition") at p. 13. Whether a disability discrimination plaintiff was a job applicant or an employee seeking to continue his employment is not relevant to the real issue in both cases, whether the plaintiff can prove he is qualified for the position despite his own representations of

total disability. All discrimination plaintiffs, regardless of whether they were current employees or job applicants, must prove that they were qualified for the position in question to survive summary judgment. E.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973); Martini v. The Boeing Co., 88 Wn. App. 442, 451, 945 P.2d 248 (1997), aff'd, 137 Wn.2d 357, 971 P.2d 45 (1999). Martini's attempt to recharacterize the applicable issue and distinguish the clear holding in Cleveland is therefore unpersuasive.

2. The Court in Cleveland Directly Considered the Trial Work Period Regulations and Underlying Policy in Reaching Its Holding.

Petitioner argues that a grant of certiorari is appropriate because "Supreme Court precedent . . . does not address the relationship between the related purposes of the ADA and the SSA to return disabled persons to work." Petition at pp. 11-12. This argument represents a blatant misrepresentation of precedent to manufacture a new legal issue where none exists. Petitioner ignores the fact that this Court in Cleveland *expressly* considered the interaction between the SSA and the ADA. The existence of and the policy underlying the trial work period regulations were factors in the Court's decision not to impose a per se bar or a presumption against ADA plaintiffs who had applied for disability benefits. Cleveland, 526 U.S. at 805 (citing 42 U.S.C. § 422(c), 423(e)(1); 20 C.F.R. § 404.1592 (1998)). Instead, after carefully considering the interaction between the SSA and the ADA, the Court concluded that summary judgment is appropriate if an

ADA plaintiff is unable to sufficiently explain his own assertions of total disability.

B. REVIEW BY THIS COURT IS NOT WARRANTED BECAUSE THE NINTH CIRCUIT COURT OF APPEALS CORRECTLY APPLIED CLEVELAND IN AFFIRMING SUMMARY JUDGMENT IN FAVOR OF BOEING.

Petitioner contends that the Ninth Circuit misapplied this Court's holding in Cleveland by applying "a complete bar to employment for persons wishing to leave disability." Petition at p. 14. This assertion is unsupported by the record. Even a cursory reading of the Ninth Circuit's opinion demonstrates that it did not apply a "complete bar" to Martini's claims. Instead, after carefully considering the facts of this case in light of the Cleveland holding, the Ninth Circuit concluded that summary judgment was appropriately entered because Martini "fail[ed] to sufficiently explain the inconsistency between his assertions of total disability and his discrimination claim. . . . " Pet. App. at pp. 1a-2a.

1. Martini Failed to Offer a Sufficient Explanation for His Repeated Representations of Total Disability and Was Therefore Unable to Demonstrate that He Was Qualified Under the ADA.

Summary judgment was appropriate in this case under the Cleveland standard. Martini swore in several forums that he was totally disabled, and his most recent statement – in the course of his workers' compensation

claim – was an *unqualified* representation, under oath, that he is "totally disabled." Pet. App. at p. 72a.

The Ninth Circuit properly considered the timing of Martini's representations as required by Cleveland and found that the timing was particularly compelling: "It is hard to imagine a stronger and more definitive representation of total disability than Martini's testimony [in August 1996] that he was totally disabled for a six year period which included the date of his Boeing application." Pet. App. at p. 4a; Cleveland, 526 U.S. 805. Martini's subsequent unsupported argument that his physical condition had improved when he applied to work at Boeing is fatally undermined by his own unqualified statements of total disability.

Furthermore, Martini made ongoing representations in several fora, including to the SSA, that he was incapable of working and accepted benefits for years based on those representations. Unlike the plaintiff in Cleveland, Martini never notified the SSA that he was able to work as required by SSA regulations. This fact is especially telling given that Martini made a sworn promise to notify the agency when he became able to work. SER 192-99. His failure to do so is not surprising in light of the fact that the record is devoid of any evidence that Martini worked at all, or even applied for a single other position, during the entire six years of his professed total disability. Pet. App. at p. 2a.

Most tellingly, Martini has *never* taken the position with the lower courts, or even with this Court, that he is

capable of working.[4] He has never, as required by Cleveland, proffered an explanation to reconcile his prior representations of total *inability* to work, with his burden of proving that he was *qualified* for the positions he sought at Boeing. Martini simply argues that he "might" be able to work and that Boeing should have hired him on a "trial basis." Petition at p. 13. Even Martini's own physician asserts only that Martini might have succeeded in "provisional employment." Pet. App. at p. 61a.[5] The ADA and the Washington Law Against Discrimination ("WLAD"), however, require proof that a plaintiff *is* qualified to work. Cleveland, 526 U.S. at 806; Martini, 88 Wn. App. at 451. The ADA and the WLAD do not require employers to hire people who are not sure whether they are qualified for the jobs for which they apply, and they certainly do not allow such individuals to pursue lawsuits when they are not hired.

The only fact offered by Martini to counter the overwhelming evidence that he was not qualified when he applied to work at Boeing is a single employment application, to Boeing, during the entire six-year period in question. Petition at p. 15 (stating that Martini's job application is the "most important evidence" of his ability to work). Martini's employment application reflects no more than his professed interest in a particular position, which

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[4] This fact alone distinguishes Martini's claim from the one in Cleveland and similar cases. In those cases, the plaintiffs affirmatively asserted, for purposes of their ADA claims, that they were capable of working. Martini fails even to do that.

[5] It is important to note that the physician who made this statement was Martini's psychologist, and did not treat his physical impairments. Pet. App. at p. 59a.

is insufficient to defeat a motion for summary judgment as a matter of law. Cleveland, 526 U.S. 806 (requiring that ADA plaintiff demonstrate that he or she is qualified to survive summary judgment); Martini, 88 Wn. App. at 451, 945 P.2d at 253 (under state law a plaintiff cannot proceed with a disability discrimination claim absent proof that he was "qualified" to work). The requirements of a prima facie case under the ADA and the WLAD would be eviscerated if merely expressing an interest in gaining or keeping employment were sufficient to survive summary judgment. Indeed, it is difficult to imagine a single plaintiff who would be unable to meet this burden.

2. Because Martini Failed to Present Even a Prima Facie Case of Disability Discrimination, Boeing's Reasons for Not Selecting Martini Are Irrelevant.

Under well settled Supreme Court and Ninth Circuit precedent, Martini has the initial obligation to establish his prima facie case of disparate treatment. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981); Coleman v. Quaker Oats Co., 232 F.3d 1271, 1296 (9th Cir. 2000). A required element of plaintiff's prima facie case is that he was a "qualified individual," that is an "individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." See, e.g., Kennedy v. Applause, Inc., 90 F.3d 1477, 1480 (9th Cir. 1996) (citing 42 U.S.C. § 12111(8) and 29 C.F.R. § 1630.2(m)). This same analysis also controls Martini's discrimination claims

arising under the WLAD. Kees v. Wallenstein, 161 F.3d 1196, 1199 (9th Cir. 1998) ("The court decides plaintiffs' state antidiscrimination claims using the same analysis it uses to interpret federal antidiscrimination law."); accord Fell v. Spokane Transit Authority, 128 Wn.2d 618, 911 P.2d 1319, 1327 (1996) (explaining that the WLAD requires a plaintiff to prove a prima facie case of disability discrimination before shifting the burden to the employer to prove a legitimate non-discriminatory reason for the employment action).

Martini seems to argue that he should be able to pursue a disability discrimination claim without proving that he was qualified to work when he applied to Boeing. In essence, Martini argues that Boeing is liable for not considering accommodation, even though Martini has failed to allege, much less offer evidence to support, that he was *qualified* to work. This nonsensical proposition is diametrically opposed to settled federal and state law. See, e.g., Kennedy, 90 F.3d 1481-82 (to avoid summary judgment, a plaintiff is required "to present evidence . . . to create at least a genuine issue of material fact on the question of whether she was a qualified individual"); RCW 49.60.180 (employer not obligated to hire applicant who is unable to perform job); WAC 162-22-050 (same).

Martini attempts to sidestep his inability to prove a prima facie case by misstating the issue and misrepresenting the facts. He claims that he should prevail because Boeing erected "barriers of presumptive disability" between him and the job he sought, and rejected him "out of hand because he was on disability." Petition at pp. 6, 13. The record is devoid of any evidence to support

these assertions. Boeing's reasons for not selecting Martini were never reached below because they are irrelevant. Only once plaintiff has proven his prima facie case does the burden shift to the employer to provide a legitimate, non-discriminatory reason for the challenged employment decision. Because Martini failed to prove he was qualified, an essential element of his prima facie case, summary judgment was appropriately entered and upheld pursuant to Cleveland.

3. The Ninth Circuit Properly Considered the Trial Work Period Regulations and Concluded that Based on Cleveland and Ninth Circuit Precedent, Martini Was Not a Qualified Individual With a Disability.

Martini argues that a grant of certiorari is appropriate because "the Ninth Circuit decision totally ignored the need to address and harmonize the trial work period provisions" with employers' obligations under the ADA. Petition at p. 17. Both this Court and the Ninth Circuit have concluded that the Cleveland test is sufficiently sensitive to the policies underlying both the SSA and the ADA. Cleveland, 526 U.S. at 805 (expressly considering existence of and policy underlying trial work period regulations); see also Johnson v. Oregon, 141 F.3d 1361, 1367 n.3, 1369 (1998) (same). The Ninth Circuit fully considered the decisions and reasoning in Cleveland and Johnson. Pet. App. at pp. 2a-4a. Pursuant to those decisions, the Ninth Circuit did not apply a per se bar to Martini's claim, but allowed him to attempt to explain the inconsistencies in his statements. Id.

Other than their role as a factor underlying the Cleveland test, the trial work period regulations are irrelevant here. The regulations obviously presuppose that the benefits recipient is actually capable of working. Instead, Martini argues that the mere existence of the trial work period regulations is sufficient to render him a qualified individual with a disability. Accepting this argument would lead to the absurd result that all disability discrimination plaintiffs would be deemed qualified for purposes of the ADA solely because the regulations exist.

As this Court clarified in Cleveland, the SSA policy encouraging a trial work period is not relevant to the factual question of whether a given individual is capable of employment. Cleveland, 526 U.S. at 807; Johnson, 141 F.2d at 1369 (holding that even with the existence of the SSA's trial work regulations, an individual's "prior representations may be so strong and definitive that they will defeat the plaintiff's prima facie case on traditional summary judgment grounds."). Martini's reference to the trial work period allowed by the SSA does nothing to dispute the fact that his prior representations of total disability are so consistent and pervasive that he cannot prove a prima facie case of disability discrimination.

4. Certiorari Is Inappropriate Because Petitioner Presents Nothing More than a Disputed Factual Issue.

Instead of offering a legitimate basis for a grant of certiorari, Martini's arguments boil down to nothing more than a disputed issue of fact: whether Martini was

qualified for the position he sought. This is not an appropriate basis for a grant of certiorari. As this Court has clearly stated, "We do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnson, 268 U.S. 220, 227 (1925).

It is clearly the function of the lower courts, not the Supreme Court, to examine the facts and weigh evidence. The district court and the Ninth Circuit had the full record before them, and carefully considered the facts presented in light of applicable precedent. Both courts reached the same conclusion, that Martini could not prove a prima facie case of disability discrimination. Because this Court is typically loathe to grant certiorari when two courts reach the same conclusion on a factual matter, certiorari is not warranted in this case. See Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949) (holding that "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error."). The Petition presents no evidence of obvious and exceptional error. Instead, the record amply demonstrates that Martini was not qualified for the position sought.

C. THE ISSUE OF WHETHER THE NINTH CIRCUIT PROPERLY DECLINED TO CERTIFY THE STATE LAW ISSUE INVOLVED FAILS TO OFFER A COMPELLING REASON TO GRANT CERTIORARI AS REQUIRED BY SUPREME COURT RULE 10.

1. Certification Was Inappropriate Because this Case Presents No New Issue of State Law.

As petitioner's own brief concedes, federal courts have discretion in determining whether to certify an issue to a state court. See Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974). Certification is "manifestly inappropriate," however, where the case presents no new issue of state law. Houston v. Hill, 482 U.S. 451, 471 (1987).

Washington law is also clear that certification to the Washington Supreme Court is appropriate only if the question at issue "is one which has not been clearly determined." Washington Rule of Appellate Procedure 16.16(a); RCW 2.60.020. The Ninth Circuit properly declined to certify the issue of whether summary judgment was appropriate because the issue before the court was not an undecided issue of state law. Cleveland and the Ninth Circuit decisions upon which the district court and Ninth Circuit relied are based on Federal Rule of Civil Procedure 56 ("FRCP 56"), which states that summary judgment shall be granted if the submissions of the parties "show that there is no genuine issue as to any material fact." The parallel Washington standard is *identical* to FRCP 56. Washington Superior Court Civil Rule 56(c). Accepting Martini's argument would mean that every federal appeal involving summary judgment on a

state law claim would result in certification of a question to state court.

Martini premises his certification arguments on a false assumption that resolution of his claims turns on possible differences between state and federal disability discrimination laws. Martini's arguments miss the mark, in part because none of the differences between the ADA and the WLAD noted by Martini have any relevance to this case. Petition at p. 19. More importantly, resolution of the issues in this case turns on whether summary judgment against Martini was appropriate given the absence of any issue of material fact on whether he was "qualified" to work. Both the ADA and the WLAD require proof of qualification to work as an element of a plaintiff's prima facie case. Cleveland, 526 U.S. at 806; Martini, 88 Wn. App. at 451. Thus, the Ninth Circuit appropriately declined to certify the issue to the Washington Supreme Court because the state law issues involved are well settled.

2. Martini's Proposed Questions for Certification Misstate the Issues.

Martini attempts to create new issues of state law by mischaracterizing the issues involved in this case in his proposed questions for certification. In his first question, Martini asks whether prior statements of total disability create a presumption that a plaintiff is not "qualified." Petition at pp. 18-19. The Supreme Court has already decided this question in the negative, and the Ninth Circuit properly applied Cleveland to the facts of this case. Accordingly, this question is moot.

Martini's second question asks whether an employer is required to explore accommodation for any applicant who states he is unable to work. Petition at p. 19. This question only begs the *real* issue before the district and Ninth Circuit – whether Martini, having failed to allege or proffer evidence supporting that he was qualified to work, can proceed with his WLAD failure-to-hire claim. If Martini is suggesting that an employer must explore accommodation for a job applicant who is not "qualified" to work with (or without) accommodation, then the Ninth Circuit properly declined to certify this issue, because the answer is in the statute itself. RCW 49.60.180 (employer not obligated to hire applicant who is unable to perform job); WAC 162-22-050 (same); see also Martini, 88 Wn. App. at 451, 945 P.2d at 253 (plaintiff's prima facie case must include proof that plaintiff was qualified to work).

Instead of demonstrating the existence of unresolved issues of state law, Martini's attempt to obtain certification represents blatant tactical forum-shopping. Martini could have argued to the trial court that his ADA claim and WLAD claims are somehow different, but he chose not to. Instead, he waited until the district court ruled against him, then sought certification for the first time with the Ninth Circuit to gain another hearing on the merits in a different forum. The Ninth Circuit clearly disfavors such manipulation of the certification process:

> We believe that particularly compelling reasons must be shown when certification is requested for the first time on appeal by a movant who lost on the issue below. Ordinarily, such a movant should not be allowed a second chance at victory when, as here, the district court

> employed a reasonable interpretation of state law.

In re Complaint of McLinn, 744 F.2d 677 (9th Cir. 1984) (declining to certify issue to state court), cert. denied, 488 U.S. 925 (1988). Martini has offered no evidence or applicable precedent to support his claim that the district court improperly applied state law. In sum, the Ninth Circuit properly declined certification.

III. CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

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